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In the Supreme Court of the United States

OCTOBER TERM, 1917

THE STATE OF ARKANSAS,

vs.

THE STATE OF TENNESSEE.

No. 2 Original.

REPLY BRIEF FOR STATE OF ARKANSAS.

JOHN B. ARBUCKLE,
Attorney General,
and
CARUTHERS EWING,
Solicitors for Arkansas.

IN THE

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THE STATE OF ARKANSAS

vs. No. 4 Original.

THE STATE OF TENNESSEE.

REPLY BRIEF FOR STATE OF ARKANSAS.

A careful analysis of the brief and argument for the State of Tennessee shows that the learned counsel for the defendant is somewhat confused as to the various propositions involved.

I.

It is said, at page 3, that "Tennessee contends that the true boundary line is, and should continue to be, a line drawn along **the abandoned bed of the river** at a point equidistant between its well defined and principal banks at a normal stage of water."

At page 25 it is, in effect, said that Tennessee does not contend that the true boundary line is within "the **abandoned bed** of the river," "but at a point equidistant between the principal and well defined banks of the **former stream,**" and at page 28 it is said "that as a result of the avulsion the abandoned bed of the

river went dry, and that on the happening of this event, the old lines, as they existed in the earliest record we have thereof, to-wit, 1823, were re-established."

In the nature of a sub-title, at page 28, it is said and italicized:

> **"Effect of avulsion was to leave boundary in abandoned bed of stream."**

Whereas, at page 7, as a sub-title, there appears in italics:

> **"Since the avulsion of 1876 caused the old river bed to dry up, old lines should be re-established, and this by applying the doctrine of submergence and reappearance of land."**

In view of the stipulation as to facts, that is, that the bed of the river of 1823 was not the bed of the river of 1876, and that the only river bed which was abandoned as the result of the avulsion was that of 1876, it is quite difficult to reconcile the statements and insistences of counsel.

And, again, it is obvious that if, as counsel frequently assert, the boundary line is to be found within "the abandoned bed of the river," it cannot be that, because of or by the avulsion, "old lines" as they existed in 1823 "were re-established." It cannot be true that the boundary line is to be found in "the abandoned bed of the river" and it also be

true that it must be found elsewhere through the medium of a "re-establishment" of a pre-existing line.

The learned counsel for Tennessee, in their argument, do not overlook the stipulation that the river of 1876 was not within the same bed as the river of 1823, for at page 30 they say:

> "It must be borne in mind that between 1823 and 1876 the river had moved southwardly and westwardly for a considerable distance into Tennessee territory, through erosion and caving in of the banks on the Tennessee shore," etc.

And, while frequently conceding and asserting that the effect of an avulsion is to leave the boundary in the abandoned bed of the stream, and making that statement the heading of a discussion commencing at page 28, it is yet said that the effect of the avulsion "was to press back the boundary line to where it was in 1823, the date of the oldest record of the line since Tennessee was admitted to the Union" (page 3), and this statement is repeated at page 28.

It is said, at page 29:

> "We concede, and entirely agree with learned adversaries, that the effect of the avulsion in 1876 was not to carry the boundary line between Arkansas and Tennessee into the new channel in Centennial Cut-Off, across the heel of

> the Horseshoe, referred to in our statement of facts, but that the boundary remained and still is in the abandoned bed of the old channel around the bend."

The above is all that the State of Arkansas has ever claimed, that is, that the line "is in the abandoned bed of the old channel around the bend."

It is contended, at times, by the learned counsel for the State of Tennesse that the effect of the avulsion was to press back the line between the States to a point which was not in the bed abandoned by the river of 1876, and at other times it is conceded that the boundary line is to be found in this abandoned river bed.

If the boundary line is to be found in the abandoned river bed, it is, of course, unnecessary to discuss whether an avulsion entitled either State to a "re-establishment" of previously existing lines. The boundary line was left by the avulsion in the abandoned river bed or it was pressed back to some other point or the avulsion brought about a situation which calls for some sort of "re-establishment" of the line.

II.

The proposition is advanced that **"the rule of the thalweg should not be applied after a stream aban-**

dons its bed in which a boundary line is to be established" (page 5).

The only reason given why the "rule of the thalweg" (so-called) should not be applied to the given case is said to be the absence of "the preservation of rights of equality in navigation and fishery." (Page 5).

If where water flows in a navigable river the boundary line between two States is at a certain place, then it must continue at that place after an avulsion or the boundary line is altered by the avulsion. So that it is obvious that "the rule of the thalweg" must be applied if, as counsel at times seemingly concede, an avulsion does not alter a boundary line between States.

In other words, the territorial limits of each State are said to extend to a certain point within a navigable river, but the argument is that should the waters of the river be diverted by avulsion there is a change wrought in the territorial limits of the two States.

Under a separate heading, advancing this proposition ("The rule of the thalweg should not be applied after a stream abandons its bed in which a boundary is to be established," page 10), counsel cite an opinion by the Hon. Caleb Cushing, Attorney General (8 **Opinions of Attorney Generals**, 177, 178), and the

reason that eminent lawyer gave why an avulsion did not affect a boundary line completely answers the insistence here made by the State of Tennessee. The learned Attorney General said that "just as a stone pillar constitutes a boundary, not because it is stone, but because of the place in which it stands, so a river is made the limit of nations, **not because it is running water** bearing a certain geographical name, but because it is water flowing in a given channel and within given banks which are the real international boundary." (Page 13.)

If that which is called "the rule of the thalweg" is a sound rule, then it should be applied despite the avulsion, for the line runs along the middle of the navigable channel, not because it is **running water**, but because that line is the real international boundary.

Counsel here again run counter to the universally recognized rule that the avulsion of 1876 had no effect on the boundary line between the two States.

III.

The suggestion is made by Tennessee's learned counsel that the line, to-wit, a point equidistant between well defined banks, rather than the middle of the navigable stream, is a matter which has been "established by interpretation, acquiescence and prescription." The argument made in this behalf has

no relation to whether the line is to be run in the abandoned bed of the river of 1876 or an old line "re-established" by a pressing back process, but we respectfully submit that there has been no interpretation of any treaty by any authority, nor has there been any acquiescence in any line, nor any prescriptive rights acquired to any territory in so far as relates to whether the line should be run between well defined banks or along the middle of the river at low water mark.

An examination of the authorities cited to this proposition by Tennessee's learned counsel will show an utter absence of any basis for a claim of a prescriptive right in the one State or the other.

IV.

In order to bring it about that the avulsion altered the boundary line between the two States, Tennessee must invoke the doctrine of reliction. It is insisted at page 29 that "the doctrine of submergence and reappearance of land applies, and **old boundaries are re-established.**"

No case cited to this point sustains the insistence that the effect of an avulsion is to alter property lines and property rights by applying a doctrine which relates only to property lines and property rights when land is uncovered gradually and imperceptibly.

A most casual examination of the cases on which Tennessee relies will disclose that there is no foundation for an abandonment of the rule that property and boundary lines and rights are not altered by an avulsion, even though it is generally recognized that when one owns submerged soil from which the water gradually recedes he will still have that land if it can be identified.

In this connection it is said that the facts in this case are "peculiar," and further:

> "The state of facts in the case at bar is unusual and permits of the readjustment of boundary lines so as to restore to each grantee in Arkansas and Tennessee his lands affected by the changes from time to time in the course of the Mississippi River during a period of approximately forty years." (Page 43).

It may well be said that the sudden abandonment of a river bed "is unusual," but this is to be always said of any avulsion, that is, any sudden abandonment by a river of its bed. No peculiar and particular reason exists in the case at bar for making an avulsion the basis "of readjustment of boundary lines" and the setting at naught of changes made "from time to time in the course of the Mississippi river" prior to the avulsion.

We submit these observations to the Court because from the inception of this controversy there has been,

as we view it, a misconception of the law and a confusion with respect to exactly the propositions Tennessee asserts to be the basis of her claims.

We are as much bewildered by the brief of the very able and learned attorneys for the State of Tennessee as by the opinion of the Supreme Court of the State of Tennessee **(State vs. Muncie Pulp Co.)** which was evidently the source and inspiration of their argument.

Respectfully submitted,

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and
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